

STATE WATER RESOURCES CONTROL BOARD

**POLICY
ON
SUPPLEMENTAL
ENVIRONMENTAL PROJECTS**

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CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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I. INTRODUCTION

The State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (Regional Water Boards, collectively Water Boards) may allow a ~~responsible settling~~ party¹ to satisfy part of the monetary assessment imposed in an administrative civil liability (ACL) order arising out of a settlement by completing or funding one or more Supplemental Environmental Projects (SEPs).

Assembly Bill 1071 (AB 1071), ~~passed into law~~enacted in October 2015 as Public Resources Code section 71118, in part (a)(3), defines a SEP as “an environmentally beneficial project that a person subject to an enforcement action voluntarily agrees to undertake in settlement of the action and to offset a portion of a civil penalty.”^{2,3}

The State Water Board supports the inclusion of SEPs, ~~and in some cases enhanced compliance actions (ECAs)~~⁴ in the settlement of an enforcement action~~ACL actions~~, so long as these projects meet the criteria specified in this Policy to ensure that the selected projects have environmental value, further the enforcement goals and other important policies of the Water Boards, and are subject to appropriate input and oversight by the Water Boards. These broad objectives should also be considered when the Water Boards agree to a SEP as part of the settlement of civil litigation.

SEPs and Enhanced Compliance Actions (ECAs)⁵ are an adjunct to the Water Boards’ enforcement program and can never be the basis or reason for bringing an enforcement action. While SEPs can be useful in the facilitation of settlements, the funding of SEPs is not a primary goal of the Water Boards’ enforcement program, nor is it necessary that a SEP always be included in the settlement of an enforcement action that assesses a monetary liability or penalty.

A. Using this Policy

This Policy on SEPs (Policy) establishes a framework for the Water Boards to use in exercising their enforcement discretion to determine appropriate settlements. To include a proposed project in a settlement as a SEP, the appropriate Water Boards’ staff should:

- (1) Ensure that the project conforms to the basic definition of a SEP (Section III);
- (2) Ensure that all legal guidelines are satisfied (Section IV);

¹ For ease of reference and because this Policy applies broadly to classes of parties commonly referred to in a variety of ways, including, but not limited to, “dischargers,” “diverters,” “regulated public,” “violators,” and “responsible parties,” the term “~~responsible settling~~ parties” is used universally throughout when referring to the party who has agreed to a SEP to settle a portion of its administrative civil liability.

² Water Code section 13385(l)(2) also defines a SEP as “an environmentally beneficial project that a person agrees to undertake, with the approval of the regional board, that would not be undertaken in the absence of an enforcement action under this section.” Water Code section 13385(i) allows limited use of SEPs associated with mandatory minimum penalties.

³ Similarly, Water Code section 13399.35(b) defines a SEP as “an environmentally beneficial project that a person agrees to undertake, with the approval of the regional board, which would not be undertaken in the absence of an enforcement action under [Water Code] Section 13399.33” and allows limited use of SEPs for up to 50 percent of a penalty assessed under section 13399.33.

⁴ ~~An ECA is a project that enables a discharger to make capital or operational improvements beyond those required by law, as distinguished from projects required to bring a discharger into compliance. An ECA differs from a SEP in that an ECA may directly benefit a discharger, but it must go “above and beyond” what is required for compliance. ECAs are also governed by this Policy.~~

⁵ ECAs are defined at Section IX of the 2017 Water Quality Enforcement Policy and are also subject to the terms and conditions of this Policy.

- (3) Ensure that the project fits within one (or more) of the designated categories of SEPs (Sections V) and is not prohibited (~~and Section VI~~);
- (4) Ensure that project solicitation and selection criteria are utilized in choosing the SEP (Section VII);
- (5) Ensure that all requirements for settlements that include a SEP are satisfied (Section VIII); and
- (6) Ensure that all additional requirements for stipulated orders that include a SEP are satisfied (Section IX).

In some cases, strict application of every requirement of this Policy may not be appropriate. In such cases, the Director of the State Water Board's Office of Enforcement (OE) may approve ~~use~~ an alternative or modified approach, so long as it substantially complies with the Policy.

B. Applicability

This Policy revises and supersedes the State Water Board's February 2009 *Policy on Supplemental Environmental Projects*, adopted under [Resolution No. 2009-0013](#). This Policy applies to settlements of all administrative enforcement actions filed after the effective date of this Policy and to all pending cases in which the Water Boards have not reached agreement in principle with the ~~responsible~~ settling party on the specific terms of a SEP.

This Policy applies to all administrative enforcement actions taken under the authority of the environmental statutes and regulations that the Water Boards administer, and applies to the State Water Board's Office of Enforcement; the Division of Water Quality and the Regional Water Boards; the Division of Drinking Water and its Districts; and the Division of Water Rights (hereafter referred to as Regional Water Boards and ~~State Water Board~~ Divisions or Water Boards). Nothing in this Policy restricts Water Boards from establishing additional, more stringent criteria for SEPs through the appropriate public process.

This document is a settlement policy for administrative enforcement actions and is not intended to be binding on the Water Boards, ~~defendants~~ settling parties, or courts in a trial. This Policy is intended for use by Water Boards' enforcement personnel in settling administrative enforcement cases and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the Water Boards, its staff, or any person. This document is not intended to supersede any statutory or regulatory requirements. Any inconsistencies between this document and any statute or regulation should be resolved in favor of the statutory or regulatory requirement. The Water Boards reserve the right to change this Policy at any time ~~without prior notice~~ through the appropriate public process. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

II. SUPPORTING THE WATER BOARDS' MISSION

SEPs can provide environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. Therefore, SEPs are an important component of the Water Boards' enforcement program, although they may not be appropriate in the settlement of all cases. SEPs can also help to further the Water Boards' mission "to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations." Part of this mission includes, but is not limited to: furthering the human right to water, ensuring environmental justice, and addressing climate change.

A. Human Right to Water

On February 16, 2016, the State Water Board adopted [Resolution No. 2016-0010](#) which identifies the human right to water as a top priority and core value of the Water Boards. Pursuant to Water Code section 106.3, “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” [Section VIII of this Policy sets forth specific provisions designed to encourage ~~r~~Responsiblesettling parties ~~are encouraged~~](#) to consider SEPs related to drinking water that would benefit public health and further the human right to water.

B. Environmental Justice

Government Code section 65040.12(e) defines environmental justice (EJ) as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.” [Section VIII of this Policy sets forth specific provisions designed to encourage ~~r~~Responsiblesettling parties ~~are encouraged~~](#) to consider ~~agreeing to~~ [funding](#) SEPs in communities where there are EJ concerns (EJ Communities). SEPs can help promote the health, safety, and well-being of residents who spend significant portions of their time in, or depend on food and water sources located in EJ Communities near the areas affected by violations⁶.

C. Climate Change

On March 7, 2017, the State Water Board adopted [Resolution No. 2017-0012](#) requiring a proactive approach to climate change in all Water Board actions and programs. Projects that address reducing greenhouse gas emissions and building resilience to climate change impacts on ecosystems or infrastructure may qualify as SEPs [if they benefit groundwater, surface water, or drinking water quality or quantity and the beneficial uses of waters of the State, or if they meet the requirements for multi-media SEPs set forth in Section V of this Policy.](#)

III. DEFINITION AND CHARACTERISTICS OF A SEP

Public Resources Code section 71118 (a)(3) defines a SEP as “an **environmentally beneficial project** that a person subject to an enforcement action **voluntarily agrees to undertake, in settlement of the action and to offset a portion of a civil penalty.**” The four bolded key parts of this definition are described in more detail below.

- (1) “**Environmentally beneficial**” means a SEP must improve, protect, or reduce risks to public health or the environment. While in some cases a SEP may provide the ~~responsible~~[settling](#) party with an incidental benefit, there must be no doubt that the project primarily benefits public health and/or the environment.
- (2) “**Voluntarily agrees to undertake**” means the SEP shall not be an action, process, or product that is otherwise required of the ~~responsible~~[settling](#) party by any rule or regulation of any federal, state, or local entity, or that is proposed as mitigation to offset the impacts of a ~~responsible~~[settling](#) party’s project(s). A SEP shall only consist of measures that go above and beyond the otherwise applicable obligations of the ~~responsible~~[settling](#) party. The ~~responsible~~[settling](#) party must voluntarily agree to a SEP.

⁶ [Since SEPs only arise in the context of a settlement and settlements do not always involve admitted or proven violations, the term “violations” used in this Policy should be construed to include admitted, proven, or even “alleged violations.”](#)

A SEP cannot be compelled by the Water Boards. SEPs cannot include actions which the responsible settling party, or any other regulated third party, is likely to be required to perform, such as:

- a. Injunctive relief, including as a mitigation project;
- b. Injunctive relief in another legal action the Water Boards, or another regulatory agency, could bring;
- c. Part of an existing settlement or order in another legal action; or
- d. By any other federal, state, or local requirement.

(3) **“In settlement of an enforcement action”** means:

- a. The responsible settling party’s commitment to perform the SEP is included in a legally enforceable settlement document, i.e., the Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (stipulated order or order);
- b. The relevant appropriate Water Boards has the opportunity to review and comment on the scope of the project selected by the responsible settling party and recommended by staff before it is implemented; and
- c. The project is not commenced until after the Water Board has identified a violation and the stipulated order is in effect.

(4) **“To offset a portion of a civil penalty”** means that the Water Boards may allow a responsible settling party to satisfy up to 50 percent of the monetary assessment imposed in an ACL order arising out of a settlement by completing or funding one or more eligible SEPs. The amount of the monetary assessment satisfied by a SEP is treated as a suspended liability until the Water Boards find that the SEP has been satisfactorily completed. The remaining portion of the monetary assessment is paid ~~at the time that the stipulated order goes into effect~~ to the appropriate fund authorized by statute for specific environmental purposes (e.g., the Cleanup and Abatement Account [CAA], the Waste Discharge Permit Fund [WDPF], or the Water Rights Fund [WRF]) in accordance with statutory requirements and/or the terms of the stipulated order. at the time that the stipulated order goes into effect.

The Water Boards may never agree to compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP. Performance of a SEP does not alter a responsible settling party’s obligation to remedy a violation expeditiously and return to compliance or comply with all applicable regulatory obligations. Projects or actions already required by law or regulation are not acceptable as SEPs or ECAs, and projects that are not required, but that reflect standard industry practices, are generally not acceptable either as SEPs or ECAs, but may be considered as part of the injunctive relief package of the stipulated order.

IV. LEGAL GUIDELINES

The Water Boards have broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of a settlement. In addition to other statutory authority in the Water Code regarding the use of SEPs, Government Code section 11415.60 has been interpreted by the State Water Board’s Office of Chief Counsel to allow the imposition of SEPs as part of the settlement of an ACL. The evaluation of whether a proposed SEP is within the Water Boards’ authority and consistent with all statutory requirements may be a complex task. This Policy is informed by Public Resources Code section 71118 (b), which requires each board, department, or office (BDO) within the California Environmental Protection Agency (CalEPA) to establish a policy on SEPs that benefit disadvantaged communities (DACs). The Public Resources Code requires the mandatory DAC SEP policies to include all of the following:

- (1) A public process to solicit potential SEPs from DACs.
- (2) An allowance that up to 50 percent of an administratively-imposed civil liability be eligible to fund a SEP.
- (3) Compilation of an annual list of SEPs that may be selected by ~~responsible~~settling parties to settle a portion of an administratively-imposed civil liability.
- (4) A consideration of the relationship between the location of the violation and the location of the proposed SEP (also referred to as nexus).

How the Water Boards implement these guidelines is detailed in Sections VII and VIII of this Policy.

V. CATEGORIES OF SEPs

The Water Boards ~~previously~~haves identified six specific categories of projects which may qualify as SEPs. Many SEPs may fall into more than one category. This Policy also establishes a seventh category for “Other Projects” that meet all the requirements of this Policy, but do not fit into one of specific categories. Allowing for “Other Projects” provides the Water Boards the flexibility they need to adapt to unforeseen circumstances, so long as the general principles and requirements of the Policy are met. SEPs in any category shall directly benefit groundwater, surface water, or drinking water quality or quantity, and the beneficial uses of waters of the State. The requirement that a SEP directly benefit water may be waived does not apply where violations of environmental laws and/or regulations affect media in addition to water and those violations are prosecuted primarily by another CalEPA BDO, or the California Department of Fish and Wildlife, in addition to the Water Boards. SEPs in any category must also have an adequate nexus to the location or the nature of the violation and meet all other ~~the~~ requirements of this Policy.

A. Public Health

Public health projects are ~~drinking water~~ projects that ~~may~~ further the human right to water and/or sanitation in a community. Examples include, but are not limited to: providing replacement drinking water, installation of water tanks, ~~drinking~~ water distribution system infrastructure improvements or consolidation assistance, private well testing, and focused community outreach regarding drinking water safety. ~~Drinking water-related SEPs are acceptable where the primary beneficiary of the project is the population that was harmed or put at risk by the violation(s).~~

B. Pollution Prevention

Pollution prevention projects prevent pollution at its source, before it is generated. Examples include, but are not limited to: practices that reduce the quantity and/or toxicity of pollutants entering a waste stream prior to treatment or disposal; equipment or technology modifications; process or procedure modifications; improvements in housekeeping, training, inventory control, best management practices, or other maintenance procedures; and projects which protect natural resources through conservation or increased efficiency.

C. Pollution Reduction

Pollution reduction projects result in a decrease in the amount and/or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as “pollution prevention.” Examples include, but are not limited to: installation of a more effective end-of-process control or treatment technology; stormwater low impact development installation;

improved containment; and safer disposal of an existing pollutant source; ~~and regional monitoring programs.~~

D. Environmental Restoration and Protection

Environmental restoration and protection projects include those that benefit surface or groundwater quality and enhance the condition of the ecosystem or immediate geographic area adversely affected by the violation. Examples include, but are not limited to: water or soil treatment; habitat restoration or enhancement; ~~pollution prevention or reduction~~; wetland, stream, or other waterbody protection, restoration, or creation; conservation easements; stream flow or water quality augmentation; watershed management facilitation services; and non-point source program implementation.

E. Assessments and Audits

Assessment and audit projects may include pollution prevention assessments, environmental quality assessments, ~~or~~ compliance audits, or studies and monitoring programs.

- Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes that may pose threats to water quality, water supply, or human health.
- Environmental quality assessments and studies are investigations of: the condition of the environment at a site or sites not owned or operated by the ~~responsible~~settling party; the environment impacted by a site or facility regardless if owned or operated by the ~~responsible~~settling party; or threats to human health or the environment relating to a site or facility regardless if owned or operated by the ~~responsible~~settling party.
- Environmental compliance audits are independent evaluations of a ~~responsible~~settling party's compliance status with environmental requirements at a given point in time. In general, compliance audits are acceptable as SEPs only when the ~~responsible~~settling party is a small business, small community (less than 2,500 persons), or a state or local government entity.

The Water Boards may not approve an assessment, study, monitoring program or audit SEP performed by a ~~responsible~~settling party relating ~~primarily~~ to that party's facility or facilities and not primarily having a broader, Water Board program-based benefit without also requiring the ~~responsible~~settling party to address the problems identified in the assessment, study, monitoring program or audit. ~~A~~Additionally, an assessment or monitoring project without a commitment to address the findings of the assessment is~~are~~ permissible where the Director of OE determines that the SEP delivers other benefits worthy of SEP credit. ~~These a~~Assessments, studies, monitoring programs and audits are only acceptable as SEPs when the ~~responsible~~settling party agrees to provide the Water Boards with a copy of the relevant report and the results are made available to the public.

F. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to ~~other~~ members of the regulated community other than the ~~responsible~~settling party in order to: identify, achieve, and maintain compliance with applicable statutory and regulatory requirements; or go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements. Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory

program requirements that were violated and where compliance in the sector would be significantly advanced by the proposed project.

G. Other Projects

Projects that do not fit within one of the six specific categories above, but have environmental and/or public health benefits and are otherwise fully consistent with all other provisions of this Policy, are allowable as SEPs subject to approval by the appropriate Regional Water Board or ~~State Water Board~~ Division. Examples may include, but are not limited to: water quality or drinking water-related educational outreach; and collection system capital improvements.

VI. PROJECTS NOT ACCEPTABLE AS SEPs

The following are examples of the types of projects that are not allowable as Water Boards' SEPs. This list is not exhaustive.

- (1) General public educational or public environmental awareness projects (e.g., sponsoring public seminars on water issues, conducting tours of environmental controls at a facility or treatment plant, or promoting recycling in a community).
- (2) General cash Contributions-contributions to environmental research at a college or university that are not directed towards a specific, approved project defined in the stipulated order and that otherwise complies with this Policy.
- (3) General cashCash donations to community groups, environmental organizations, state/local/federal entities, or any other third party that are not directed towards a specific, approved project defined in the stipulated order and that otherwise complies with this Policy.
- (4) Projects for which the responsiblesettling party does not retain full responsibility to ensure satisfactory completion.
- (5) Projects ~~for which the responsible party pays a third party-managed fund to implement, but for which the project is~~ that are not clearly defined ~~in at the time of~~ the stipulated order ~~effective date~~ to ensure adequate nexus and transparency of the use of public funds.
- (6) Projects which, though beneficial to a community or environment, are unrelated to the Water Boards' mission (e.g., making a contribution to a non-profit, public interest, environmental or other charitable organization, donating playground equipment, etc.).
- (7) Studies, assessments, or monitoring projects ~~grams except as described in section V.E. without a requirement to address the problems identified in the study.~~
- (8) Projects which the responsiblesettling party, SEP recipient, or SEP implementer has already committed to ~~will undertake, in whole or in part, with~~ based on existing commitments of federal or state loans, contracts, grants, or other forms of financial assistance or non-financial assistance.
- (9) Projects that are expected to become profitable to the responsiblesettling party within the first five years of implementation (within the first three years for SEPs implemented by responsiblesettling parties that are small businesses or small communities) are prohibited. After that time period, profitable projects where the environmental or public health benefit outweighs the potential profitability to the responsiblesettling party may be allowable with approval by the ~~State Water Board's OE~~ Director of OE.
- (10) Projects that provide raw materials only, with no commitment from the responsiblesettling party for a completed project utilizing the raw materials (e.g., donating rail ties and gravel for a fish ladder but not actually ensuring that the ladder is built).

- (11) Projects that are not complete, discrete actions with tangible water-related environmental or public health benefits.
- (12) Projects for which completion depends on the actions or contributions of individuals or entities that are neither party to the settlement nor hired by the ~~responsible~~settling party as an implementer or administrator. The term “action” as used above does not include permitting approvals or other action by a local, state, or federal agency necessary to implement the project. Monetary contributions necessary to implement the project that have been encumbered at the time of settlement specifically for the project are permissible.
- (13) SEPs may not include actions that a third party is legally required to perform by any federal, state, or local law or regulation (also referred to as third party compliance projects).

VII. PROJECT SOLICITATION AND SELECTION

A. SEP Proposal Solicitation and Guidance

A SEP proposal form and guidance document will be made available to the public on OE’s SEP webpage. ~~OE shall post a SEP proposal form on the SEP webpage to solicit potential SEPs from the public (including DACs) statewide. A guidance document shall also be included to provide the public with information on how to effectively complete the SEP proposal form.~~ As SEP proposals are submitted, ~~the~~ OE will direct them to the appropriate Regional Water Board or Division for further evaluation. Each Regional Water Board or Division may choose to create its own SEP proposal form and guidance document, through the appropriate public process, to be posted on its respective website.

Regional Water Boards or Divisions may ~~also choose to~~ perform additional outreach (e.g., public workshops) at an appropriate frequency to gain community input and actively solicit SEP proposals in DACs, EJ ~~communities~~Communities, or communities with a financial hardship.

Regional Water Boards ~~and or~~ Divisions without adequate resources available to solicit and evaluate SEP proposals in their jurisdictions may request assistance to comply with this Policy’s solicitation and selection requirements in writing from the Director of OE.

B. SEP Evaluation Criteria and Potential SEP Lists

OE shall post a summary document on the SEP webpage outlining the process for evaluating SEP proposals ~~which outlines the process for how SEP proposals are evaluated, based on the requirements of this Policy,~~ both for SEPs proposed by the ~~responsible~~settling party at the time of a for-specific ACL settlement, s- and for SEPs proposed for inclusion on the statewide potential SEP list. Some-responsibleSettling parties, particularly public agencies, can perform SEPs themselves. These are referred to as “first party SEPs.” OthersSettling parties can also elect to hire and pay a third party to perform the SEP on their behalf. These are referred to as “third party SEPs.” Still-othersSomeRegional Water Boards or Divisions may elect to have an intermediary or agent administer to and oversee performance of some or the SEP by a third partyall SEPs within the appropriate Water Board’s geographic or subject matter jurisdiction. These SEPs are referred to as “third party-administered SEPs.” In the first two cases, the responsiblesettling party may select a SEP from one of the Water Boards’ lists, or propose a different SEP at the time of the settlement. In the latter case, the responsiblesettling party must elect a SEP that is on the appropriate Water Board’s list or the third party administrator’s list.

Each Regional Water Board ~~or Division may create additional SEP evaluation criteria and, post it~~on its website, and state which criteria may provide a preference for particular projects that address problems specific to the geographic region or subject matter through the appropriate public process. Each Regional Water Board ~~or Division's enforcement coordinator~~ is responsible for evaluating and responding to SEPs ~~proposed for inclusion on the SEP list proposals that are~~ within its jurisdiction on an annual basis, at minimum, ~~and may choose to create its own set of SEP evaluation criteria to be posted on its respective website.~~ Regional Water Boards ~~or the Divisions may, for example, give preference to SEP proposals that will be located in or benefit a DAC, EJ community, or a community that has financial hardship.~~ Water Boards shall inform interested parties that have submitted SEP proposals within 30 days of ~~the determination whether the proposal has qualified for the list and update of the potential SEP list accordingly~~updating their potential SEP list.

For the potential SEP list, each Regional Water Board or ~~State Water Board~~ Division may choose to have the proposed SEPs:

- (1) Pre-approved by the appropriate Water Board at an appropriate frequency;
- (2) Prioritized based on established criteria; or
- (3) Placed on the list without pre-approval or prioritization.

~~Potential SEP lists~~Regional Water Boards and Divisions may also include compile an interested parties list that, while they may not have specific projects on the list, could be contacted at the time of settlement for a SEP proposal.

Water Boards that work with a third party administrator for SEP oversight and implementation shall work with OE to establish appropriate evaluation criteria and a timeline for selection and Board pre-approval of the administrator, if desired. ~~All ny proposed third party administered SEPs require is not fully approved until the responsible settling party to select has selected a specific SEP from the appropriate Water Board's or third party administrator's list and agree to potential SEP list during settlement and funded it in a stipulated order.~~

Each Regional Water Board and Division shall maintain and post on its website a list of potential SEPs. This list shall include information on project description, category, location, cost, expected benefits, and the potential to benefit DACs, EJ ~~communities~~Communities, communities with a financial hardship, and the human right to water. Once a Regional Water Board or ~~State Water Board~~ Division has developed its potential SEP list, it shall submit the list to OE for compilation into the statewide potential SEP list (see Section VIII.K).

Water Boards without adequate resources available to maintain potential SEP lists may request in writing to the Director of OE that potential SEP lists for projects within that particular geographic or subject matter jurisdiction be compiled by OE.

VIII. REQUIREMENTS FOR SETTLEMENTS THAT INCLUDE A SEP

A. Water Boards' Restrictions

A SEP shall never directly benefit, in a fiscal manner, a Water Board's ~~functions, its~~ members, its staff, or family of members and staff. Any indirect benefits provided to members, staff, or family shall be only those that are enjoyed by the public generally. A SEP shall not benefit or involve friends of members, staff, or family where there could be an appearance of undue influence, suggesting an actual or apparent conflict of interest for the Water Boards. SEPs are not allowed to augment the Water Boards' budgets by replacing the Water Boards' ordinary regulatory functions.

Additionally, the Water Boards do not have authority to directly manage or administer a SEP.

B. Amount of SEP

While ~~many statutes governing other jurisdictions require that the deposit of~~ penalties and administrative liabilities for many other agencies direct that they be paid into a general fund, administrative civil liabilities and civil penalties assessed under the Water Code are paid into special funds for specific environmental purposes. The State Water Board has a strong interest in monitoring the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory management and/or disbursement responsibilities. ~~As a general rule, u~~Unless otherwise permitted by statute or approved by the Director of OE based on a finding of compelling justification due to exceptional circumstances, as described below, no settlements shall be approved by the Water Boards that fund a SEP in an amount greater than 50 percent of the total adjusted monetary assessment against the ~~responsible~~settling party. ~~-, absent compelling justification.~~ The total adjusted monetary assessment is the total amount assessed, exclusive of a Water Board's investigative and enforcement costs.

If a Regional Water Board or ~~State Water Board~~ Division proposes an order containing a SEP that exceeds 50 percent of the total adjusted monetary assessment, it shall affirmatively notify the Director of OE of that proposal. The notification shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why it proposes to accept the SEP in lieu of a monetary liability payment, and the specific facts regarding why exceptional circumstances that constitute compelling justification exist to justify exceeding ~~justify exceeding~~ the 50 percent recommended percentage limit.

The Director of OE may approve a proposed settlement to fund a SEP in an amount greater than 50 percent of the total adjusted monetary assessment after making evidence and/or policy-based findings that:

- ~~(1) there~~ There is compelling justification to do so due to exceptional circumstances ~~to do so,~~
; or
- ~~(+)(2)~~ (2) in cases where the SEP is located in or benefits a DAC, an EJ Community or a community that has a financial hardship, or where the SEP substantially furthers the human right to water.

"Disadvantaged Community" per Health and Safety Code section 39711 includes:

- Areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation; or
- Areas with concentrations of people that are of low income, high unemployment, low levels of homeownership, high rent burden, sensitive populations, or low levels of educational attainment.

"EJ Community", by reference to Government Code section 65040.12(e) includes:

- A community that bears a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies; or
- A community without meaningful involvement in the development, implementation, and enforcement of environmental laws, regulations, and policies.

"Financial hardship" means that the community meets one of the following criteria:

- Median household income for the community is less than 80 percent of the California median household income;
- The community has an unemployment rate of 10 percent or greater; or
- Twenty percent of the population is below the poverty level.

The “median household income,” “unemployment rate,” and “poverty level” of the population are based on the most recent United States Census (U.S. Census) block group data or a local survey approved by the appropriate Water Board in consultation with OE.

If the Director of OE determines that there ~~are not exceptional circumstances or is~~ is no compelling justification due to exceptional circumstances, he or she shall notify the appropriate Water Board of that determination and the SEP shall be limited to ~~the~~ 50 percent of the total adjusted monetary assessment~~limit~~.

For settlements of violations giving rise to mandatory minimum penalties (MMPs) pursuant to Water Code section 13385 (h) or (i), where the penalty amount equals fifteen thousand dollars (\$15,000) or less, the entire penalty amount may be directed to be expended on a SEP without prior approval from the Director of OE, provided the SEP meets the requirements of this Policy. Where MMPs total more than \$15,000, \$15,000 plus 50% of the remaining civil liability may be directed towards a SEP without prior approval from the Director of OE.

All SEP funds must be expended on the SEP specifically defined in the stipulated order within 36 months of the order’s adoption, unless the Executive Officer or Deputy Director of the appropriate Water Board grants an extension for good cause shown as to why the project has been delayed. Examples of good cause include things beyond the project proponent’s control such as permitting delays. The Director of OE may approve a project implementation schedule memorialized in a stipulated order allowing for SEP completion within 48 months based on a finding that the SEP provides an exceptional environmental benefit.

C. ~~Responsible~~ Settling Party and Third Party-Performed SEPs

First party SEPs (performed by the ~~responsible~~ settling party) and third party (performed by a third party under contract with the responsible settling party) SEPs can be proposed by the ~~responsible~~ settling party or chosen from the statewide potential SEP list and shall be memorialized as part of a stipulated order. In either case, the stipulated order shall satisfy all the requirements of this Policy prior to implementation of the SEP.

~~All SEP funds must be expended on the SEP project specifically defined in the stipulated order within 2436 months of the order’s adoption, unless the Executive Officer or Deputy Director of the appropriate Water Board grants an extension for good cause shown as to why the project has been delayed. Examples of good cause include things beyond the project proponent’s control such as permitting delays or plan oversight.~~

~~The State Water Board’s Water Quality Enforcement Policy (Enforcement Policy) provides, in relevant part, that ECAs are a form of responsible party-performed SEP and are projects that enable a responsible party to make capital or operational improvements beyond those required by law (see Section IX of the 2017 Enforcement Policy). ECAs must comply with this Policy except with respect to provisions that restrict projects that benefit the responsible party.~~

D. Third Party-Administered SEPs

Third party-administered SEPs are paid for by the ~~responsible~~settling party and shall also either be proposed by the ~~responsible~~settling party or chosen from the statewide potential SEP list and memorialized in a stipulated order. Similar to ~~first and third party-responsible party~~-performed SEPs, ~~in either case~~, the stipulated order authorizing third party-administered SEPs shall satisfy all the requirements of this Policy prior to implementation of the SEP.

Regional Water Boards or State Water Board Divisions that ~~use~~prefer to utilize a third party to administer SEPs within their geographic or subject matter jurisdictions should ~~utilize a vetting process to select the third party to~~ ensure that the third party administrator ~~it~~ is both financially stable and capable of successfully implementing and completing environmental projects. Third parties selected by Regional Water Boards or Divisions to administer ~~implement~~ SEPs must provide written project status reports for all SEPs they are ~~it is~~ administering to the Regional Water Board or Division and to OE on June 1 and December 1 of each calendar year.

~~All SEP funds must be expended on the SEP project specifically defined in the stipulated order within 24-36 months of the order's adoption, unless the Executive Officer or Deputy Director of the appropriate Water Board grants an extension for good cause shown as to why the project has been delayed. Examples of good cause include things beyond the project proponent's control such as permitting delays or plan oversight.~~

E. Liability

The portion of a monetary assessment adopted by a Board order ~~value of that is satisfied by~~ a SEP shall be treated as a suspended liability. Unless otherwise required by law, any order imposing a SEP shall state that if the SEP is not fully implemented in accordance with the terms of the order and, if any costs of Water Board oversight or auditing are not paid, the Water Board is entitled to recover the full amount of the suspended monetary assessment ~~penalty~~, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone. The recovered suspended monetary assessment ~~penalty~~ shall be paid to the appropriate fund authorized by statute (e.g., CAA, WDPF, or WRF). Full payment of the suspended monetary assessment ~~penalty~~ shall be in addition to any other applicable remedies for noncompliance with the terms of the stipulated order.

Any portion of the monetary assessment liability that is not suspended shall be paid to the CAA, WDPF, WRF, or other fund or account as authorized by statute and is paid at the time that the stipulated order goes into effect. The order shall state that failure to pay any required monetary assessment on a timely basis will cancel the provisions for suspended penalties for SEPs and that the suspended amounts will become immediately due and payable.

It is the ~~responsible~~settling party's obligation to pay the suspended amount(s) when due and payable, regardless of any agreements between it and any third party it has contracted with to ~~implement or~~ perform or administer the project.

Upon completion of the SEP, the ~~responsible~~settling party (or the third party administrator) shall notify the appropriate Water Board and provide proof of project completion and use of funds (see Section IX.D). The appropriate Water Board shall review the SEP documentation and shall provide the ~~responsible~~settling party with a statement indicating that the SEP has been completed in accordance with the terms of the stipulated order and that any remaining suspended liability is waived, with a courtesy copy to OE and the State Water Board's Division of Administrative Services payments unit.

F. Nexus

Public Resources Code section 71118 (b)(4) requires consideration of the ~~there be a~~ relationship between the location of the violation(s) and the location of the proposed SEP, also referred to in this Policy as a nexus. For the Water Boards, there must be a relationship between the nature ~~or~~ the location of the violation and the nature ~~or~~ the location of the proposed SEP. A relationship between the nature of the violation and the proposed SEP exists if the project demonstrates that it is designed to reduce:

- (1) The likelihood that similar violations will occur in the future;
- (2) The adverse impact(s) to public health and/or the environment to which the violation at issue contributes; or
- (3) The overall risk to public health and/or the environment potentially affected by the violation at issue.

SEPs may have a nexus even if they address a different pollutant in a different medium, provided the project relates to the underlying violation(s). A relationship between the location of the violation and the proposed SEP may exist if the primary benefits to be attained from the project are located at the same site where the alleged violation occurred, at a different site in the same ecosystem, or within the immediate geographic area (e.g., in the same community, the same watershed, or within a 50-mile radius), subject to approval by the appropriate Regional Board or Division ~~Water Board during settlement~~. The Director of OE may approve a SEP that benefits an EJ Community, DAC, community with financial hardship or the human right to water without a nexus based on findings that the violations occurred in a remote area with no nearby communities and that there are no available program-related SEPs (e.g., when violations occur at a remote abandoned mine, or other regulated site).

G. Oversight

For any SEP that requires oversight by a Water Board, the full costs of such oversight must be paid for by the ~~responsible~~settling party. Based on its resource constraints, the Water Board may require the ~~responsible~~settling party to select and hire an independent management company or other appropriate third party, which reports solely to the Water Board, to oversee implementation of the SEP in lieu of oversight by Water Board staff. If no arrangement for the payment for necessary oversight can be made, the SEP shall not be approved, absent exceptional circumstances. As a general rule, and except as provided in Section VIII.B of this Policy, such oversight costs are not costs that should be considered part of the direct cost of the SEP to the ~~responsible~~settling party for the purposes of determining the value of the SEP for settlement purposes.

In cases where the SEP directly benefits a DAC, an EJ Community, or a community with financial hardship, or furthers the ~~Human Right to Water~~human right to water, the appropriate Water Board may approve a SEP which includes oversight costs ~~for a third party administrator~~ as part of the direct cost of the SEP. In all other cases, the Director of OE must make findings to support a determination that there is a compelling justification, based on exceptional circumstances, to allow oversight costs to be part of the total value of the SEP. Oversight costs allowed under this section should be limited to 5 percent, but may be up to 10 percent where a third party administrator performs SEP program-related functions on behalf of the Regional Water Board or Division. ~~may never exceed ten percent of the total cost of the SEP. Any allowance of oversight costs must be memorialized in the stipulated order.~~

H. Accounts

As contemplated by this Policy, a SEP is a project or group of projects, the scope of which is defined at the time the SEP is authorized by a Water Board in a stipulated order. The

placement of settlement funds into an account or fund managed by a Water Board that is not an account or fund authorized by statute, or otherwise allowed by the State Water Board, is not permissible. If a Water Board wishes to establish any fund that is designed to receive money that is paid by a ~~responsible~~settling party to resolve a claim of liability under the Water Code, the appropriate Water Board should obtain the express authorization of the State Water Board. Such authorization will be subject to any conditions that the State Water Board may place on such a fund.

~~In some cases, a Water Board may choose to direct monies paid by the responsible party intended for a SEP to go into a third party-administered account (also referred to as settlement accounts) for disbursement to various approved projects. In these cases, the Water Board shall ensure that the third party uses the monies on the specific approved SEP indicated in the stipulated order within 24 months, and that a nexus to each violation is maintained when implementing pr~~The Water Boards shall not manage or control funds that may be set aside or escrowed for performance of a SEP, unless placed in an account authorized by statute or permitted by the State Water Board. The State Water Board may authorize an account and SEP program that does not strictly comply with the “specific project” requirements of Sections V.E., VI(2), VI(3) or IX.A of this Policy, including, but not limited to, those that fund regional monitoring programs.

I. Third Party Financial Audits

In addition to the Certificate of Completion (see Section IX.D), upon completion of the SEP and at the written request of the appropriate Water Board, the ~~responsible~~settling party shall submit an audit report prepared by an independent third party acceptable to the Water Board providing such party's professional opinion that the ~~responsible~~settling party has expended money in the amount claimed by the ~~responsible~~settling party. The audit report shall be provided to the ~~requesting-appropriate~~ Water Board within three months of notice of the need for an independent third party financial audit at the sole cost of the ~~responsible~~settling party. The audit need not address any costs incurred by Water Board staff for oversight. Where a Water Board has entered a stipulated order authorizing a SEP with a direct cost over one million dollars (\$1 million), it shall require ~~est~~ a third party financial audit be performed after the completion of the project at the sole cost of the ~~responsible~~settling party.

J. Publicity

Whenever the ~~responsible~~settling party, or any third party with whom the ~~responsible~~settling party contracts to perform a SEP, publicizes a SEP or the results of the SEP, it shall state in a prominent manner that the project is being undertaken as part of the settlement of a Water Board enforcement action.

K. Public Reporting of SEP Information

By March 31 of each year, ~~for the prior calendar year, or at its request,~~ each Water Board with settlement agreements that include SEPs shall provide OE with the following for the prior calendar year:

- Summary reports of each SEP completed in that calendar year in a format specified by OE;
- Results of any third party financial audits; and
- An annual update to the list of potential SEPs.

OE shall compile a report on all completed SEPs statewide for the prior calendar year to be posted on the State Water Board's SEP webpage and included in the State Water Board's Annual Performance Report. The SEP webpage shall also contain a live link to query the appropriate Water Board databases for the most current information on active and completed SEPs statewide.

OE shall also compile, based on information from the Regional Water Boards and State Water Board Divisions, a statewide list of potential SEPs to be posted on the State Water Board's SEP webpage. The statewide potential SEP list shall be updated on an annual basis, at minimum, and reported to CalEPA on an annual basis or at its request.

IX. ADDITIONAL REQUIREMENTS FOR STIPULATED ORDERS THAT INCLUDE A SEP

When SEPs are appropriate, they ~~must be~~ are adopted ~~imposed~~ as stipulated orders, in settlement of an ACL complaint or some other order proposed to be entered under the authority of a Water Board. There is no legal authority for an ACL complaint to contain a proposed SEP.

All stipulated orders that include a SEP must address the following items:

A. Project Scope and Schedule

Unless otherwise authorized by the State Water Board pursuant to Section VIII.H., ~~The~~ stipulated order must indicate a specific project, which includes or references a detailed scope of work and a budget. The order must also include a time schedule for implementation and may include multiple milestones that identify the amount of liability that will be permanently suspended or excused upon the timely and successful completion of each milestone. Milestones that allow for a portion of the liability to be permanently suspended must have an identifiable, or "stand alone," environmental benefit. Where a SEP will only have an identifiable environmental benefit after full completion, milestones that allow for permanent suspension of a portion of the liability are not allowed. Except for the final milestone, the amount of the liability suspended for any portion of a SEP cannot exceed the projected cost of performing that portion of the SEP. A final SEP completion date must be indicated in the order. The order must also contain or reference performance standards and identified measures or indicators of performance in the scope of work.

The ~~responsible~~ settling party is ultimately responsible for meeting these milestones, standards, and indicators, regardless ~~of whether~~ if the project is a ~~responsible party-performed SEP, or a third party SEP~~ first party, third party, or a third party-administered SEP.

During implementation of the SEP, any deviation in scope, budget, time schedule, milestones, performance standards, or indicators must be discussed with, and approved by, the Executive Officer or Deputy Director of the appropriate Regional Water Board or Division in advance of the deviation and applicable deadline.

B. Funding

To ensure transparency in the use of public funds, the stipulated order must contain a written acknowledgment and other appropriate verification and enforceable representation to the appropriate Water Board by either the ~~responsible~~ settling party or each third party performing or administering the SEP that any funds intended for the SEP, including funds received by the third party from the ~~responsible~~ settling party, shall be spent in accordance with the terms of the order

on a specific, defined project. ~~Where a~~ The third party performs or administers the SEP, ~~the order must provide that the third party is subject to an~~ agree to an audit of its SEP expenditures, if requested by the Water Board.

C. California Environmental Quality Act

The SEP description in the stipulated order must address how the project will comply with the California Environmental Quality Act (CEQA) and these requirements shall be incorporated into the time schedule for the SEP. Prior to commencing the SEP, the ~~responsible~~settling party or third party shall provide the appropriate Water Board with one or more of the following documents:

- Categorical or statutory exemptions relied upon by the ~~responsible~~settling party;
- Negative Declaration, if there are no potentially “significant” impacts;
- Mitigated Negative Declaration, if there are potentially “significant” impacts but revisions to the project have been made or may be made to avoid or mitigate those potentially significant impacts; or
- Environmental Impact Report (EIR).

D. Reporting and Certificate of Completion

The stipulated order must require periodic reporting (quarterly reporting at a minimum) on the performance of the SEP by the ~~responsible~~settling party so that the appropriate Water Board is able to monitor the timely and successful completion of the SEP.

The stipulated order must also require the ~~responsible~~settling party to provide the appropriate Water Board and OE with a final completion report, including a certified statement of completion of the SEP (certificate of completion). The certificate of completion shall be submitted under penalty of perjury, and include the following:

- (1) Certification of completion in accordance with the terms of the stipulated order and addressing how the expected outcome(s) or performance standard(s) for the project were met. Such documentation may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the appropriate Water Board to evaluate the completion of the SEP and the costs incurred by the ~~responsible~~settling party.
- (2) Certification documenting the expenditures by the ~~responsible~~settling party during the completion period for the SEP. To do so, the ~~responsible~~settling party may rely upon tracking systems used in the ordinary course of business that capture employee time, expenditures, and external payments to outside vendors, such as environmental and information technology contractors or consultants. The certification need not address any costs incurred by Water Board staff for oversight. The ~~responsible~~settling party shall provide any additional information requested by the appropriate Water Board, which is reasonably necessary to verify SEP expenditures.
- (3) Certification that the ~~responsible~~settling party or third party followed all applicable environmental laws and regulations in the implementation of the SEP, including but not limited to: CEQA, the Federal Clean Water Act, the Federal Safe Drinking Water Act, and the Porter-Cologne Water Quality Control Act.

Where a third party performed the SEP, or a third party administrator oversaw the SEP, that entity may provide the periodic reports, the completion report, and the certification on behalf of the ~~responsible~~settling party. Periodic and final completion reporting and certification costs may be included as part of the direct cost of the SEP.

E. SEP Acceptance

Upon receipt of the final completion report and certificate of completion by either the ~~responsible~~settling party, ~~or the third party,~~ or the third party administrator, the appropriate Water Board shall conduct a review to determine whether the SEP was completed in accordance with the terms of the stipulated order. The Water Boards may request additional information from the ~~responsible~~settling party, ~~or the~~ third party or the third party administrator if necessary to complete the review. ~~If warranted, the~~The appropriate Water Board shall provide the ~~responsible~~settling party with a statement indicating that the SEP has been completed in satisfaction of the terms of the order and that any remaining suspended liability is permanently suspended.